Supreme Court, U.S.
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No. 09-813

In The Supreme Court of the United States

WENDY GENNIMI,

Petitioner,

v.

TOWN OF LEWISBORO, JAY FAIN, JAY FAIN & ASSOCIATES, L.L.C., MARGARET CLARK, JAMES NORDGREN, JACQUELINE DZALUK, JOSEPH DECAMINADA, FREDA HALPERN, MAUREEN MAGUIRE, P.J. ROSSI, AND WILLIAM CARGAIN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Whether Petitioner has presented compelling reasons to grant the Petition, where the Second Circuit's *de novo* review resulted in a Summary Order that properly affirmed the District Court's granting of summary judgment in favor of the defendants, and where said Order does not conflict with a decision of this Court, a Court of Appeals, the state court of last resort, and where Petitioners do not claim that the Second Circuit's ruling implicates an important federal question that has not been settled by this Court.

2. Whether Petitioner has presented compelling reasons to grant the Petition, where the lower courts did not accord "full faith and credit" to a state court decision because it was not a "final" decision and did not make any findings of fact.

3. Whether Petitioner has presented compelling reasons to grant the Petition, where the inspections of Petitioner's property were appropriate pursuant to the "special needs doctrine" in that the inspections were "minimally intrusive," Petitioner had significantly reduced expectations of privacy, the Town of Lewisboro had a serious interest in protecting natural resources, and where there is no evidence that inspections were made of the curtilage.

COUNTER STATEMENT OF QUESTIONS PRESENTED – Continued

4. Whether Petitioner has presented compelling reasons to grant the Petition, where Jay Fain and Jay Fain & Associates, L.L.C. were private contractors and, as such, excluded from the reach of Petitioner's 42 U.S.C. § 1983 claims and not subject to state laws about residency.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Jay Fain & Associates, L.L.C., a Connecticut limited liability company, is not a subsidiary or affiliate of a publicly held company. No publicly owned company owns 10% or more of the membership interests of Jay Fain & Associates, L.L.C.

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STATEMENT OF THE CASE

This brief is submitted on behalf of respondents Jay Fain and Jay Fain & Associates, L.L.C. (hereinafter "the Fain respondents") in opposition to the Petition for Writ of Certiorari.

Petitioner[1] has presented no "compelling reasons" for her Petition for a Writ of Certiorari to be granted ("Petition"). *See* Sup. Ct. R. 10. Petitioner has failed to demonstrate that the Second Circuit's Summary Order of May 29, 2009 is in conflict with a relevant decision of this Court, another Court of Appeals, or the New York State court of last resort. Nor has Petitioner demonstrated that the Second Circuit has issued a decision on an important federal question that has not been settled by this Court. There is also no indication that the Second Circuit at all "departed from the accepted and usual course of judicial proceedings." *See* Sup. Ct. R. 10(a), (c).

For these reasons, and others as set forth below, Petitioner's request for a Writ of Certiorari should be denied in its entirety and particularly with respect to the Fain respondents.

The Fain respondents were retained by the Town of Lewisboro as a private contractor in August 2002 to perform duties of a wetlands inspector and wetlands consultant. The duties included that Jay Fain

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[1] Petitioner Gennimi is the only plaintiff who has sought a Writ of Certiorari.

investigate allegations of violations of wetlands laws. With respect to the Petitioner, Jay Fain received complaints from neighbors about activities that allegedly violated wetlands laws. After investigation, Jay Fain issued a summons and notice of wetlands violation. The Town then followed up with a letter to the Petitioner stating that she was entitled to representation by counsel at a hearing before the Planning Board.

Petitioner and her husband admitted to violations and agreed to implement a restoration plan. Jay Fain conducted follow-up inspections and determined that Petitioner failed to comply with the restoration plan. The subsequent course of events is set forth below.

The Statement portion of the Petition contains an implication that Jay Fain and Jay Fain & Associates were Town of Lewisboro employees. (Pet. App. at p. 3.) In fact, the Fain respondents were private consultants. (Pet. App. at p. 39a.)

REASONS WHY THE PETITION MUST BE DENIED

I. THERE WAS NO BASIS TO APPLY "FULL FAITH AND CREDIT" BECAUSE THE STATE COURT DECISION WAS NOT A "FINAL" DECISION AND DID NOT CONTAIN ANY FINDINGS OF FACT

Petitioner's contention that the District Court and Second Circuit disregarded a decision of the New York State Supreme Court is baseless because that decision did not make *any* findings of fact. (Pet. App. at p. 44a-46a.) The decision in *Town of Lewisboro v. Wendy Gennimi and Victor Schliman* was not "final" and there was nothing that could be afforded "full faith and credit." *Barber v. Barber*, 323 U.S. 77, 80-81, 65 S.Ct. 137, 139, 89 L.Ed. 82, 84 (1944). Without a finding of fact, there was nothing that the Second Circuit could have based "preclusive effect" on.

The state court merely stayed the causes of action "pending the completion of the prior pending action or actions" that were before the Town of Lewisboro Zoning Board of Appeals, Town Justice Court, and the U.S. District Court. (Pet. App. at p. 46a.) Despite Petitioner's claims, the state court decision only reviewed the allegations and defenses in the matter before it and in the "prior pending action or actions." No determinations of fact or law were made. (Pet. App. at p. 44a-46a.) The Second Circuit

therefore could not have made a finding of "preclusive effect."[2]

By arguing that the Second Circuit and District Court "failed to accord full faith and credit to the New York State court's findings of fact regarding identical wetlands claims," Petitioner has made misstatements of both law and fact. *See* Sup. Ct. R. 15(2).

In addition, Petitioner did not raise the issue of "full faith and credit" of the state court decision in her appeal to the Second Circuit.

II. THERE IS NO CONFLICT BETWEEN COURTS ABOUT WHAT CONSTITUTES A WETLAND AND, IN ANY EVENT, THIS ISSUE IS NOT RELEVANT TO PETITIONER'S CLAIMS AGAINST THE FAIN RESPONDENTS

Petitioner argues under point heading II that Jay Fain somehow determined which lands in the Town were wetlands. There is no basis for this argument, which ignores that Fain's role was limited to that of an inspector and consultant. (Pet. App. at p. 33a; also *see* p. 31a-32a.) As a private consultant, Jay Fain did not vote on adopting or revising the Town's wetlands laws and did not adjudicate charges, but merely fulfilled his job responsibilities as inspector to

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[2] The Town of Lewisboro withdrew its appeal of the state court's decision. (Pet. App. at p. 47a.)

investigate allegations and as a consultant. (Pet. App. at p. 33a, 27a.)

Petitioner's arguments about what constitutes a wetland were properly analyzed by the Magistrate in his Report that was adopted in full by the Second Circuit. The Report noted that Petitioner's property bordered State designated wetlands. (Pet. App. at p. 23a-24a, 6a.) Also, Petitioner admitted that she had understood the charges, admitted to violations of the Town's wetlands laws and agreed to undertake remediation set by the Planning Board. (Pet. App. at p. 18a-19a, 26a, 31a.) The fact that Petitioner subsequently failed to implement restoration plans, despite her agreements to do so, does not demonstrate a violation of any substantive right.

Also, Petitioner did not appeal any of the Planning Board's resolutions except for one, which was dismissed after she failed to appear. (Pet. App. at p. 19a.) It is apparent that Petitioner was capable of utilizing the appellate, post-deprivation, process. (Pet. App. at p. 5a, 19a.) And in understanding the charges brought, Petitioner was knowledgeable to utilize the pre-deprivation process as well. (Pet. App. at p. 5a, 7a.)

Petitioner makes a misstatement of fact in stating that she was "convicted of wetlands violations for building a fence around her home." (Pet. App. at p. 19a.) Petitioner actually pled guilty to charges and agreed to restoration plans (that she failed to implement). (Pet. App. at p. 18a-19a, 7a.)

III. PETITIONER HAS FAILED TO DEMONSTRATE A CONFLICT BETWEEN THE SECOND CIRCUIT'S SUMMARY ORDER AND A DECISION OF THIS COURT, A COURT OF APPEALS, OR THE NEW YORK STATE COURT OF LAST RESORT

The Second Circuit correctly held that summary judgment was properly granted to the defendants concerning the plaintiffs' Fourth Amendment claims. The Fourth Amendment claims were dismissed "because, as in *Palmieri v. Lynch*: (1) plaintiffs had significantly diminished expectations of privacy because they had applied for construction permits, *see* 392 F.3d 73, 83 (2004); or (2) the challenged inspections were "minimally invasive" insofar as they were wetlands or abutting areas, not of plaintiffs' homes, *see id.* at 84, or both; and (3) the government has a "serious" interest in protecting natural resources, *see id.* at 84-85. (Pet. App. at 5a.); citations to *Palmieri v. Lynch*, 392 F.3d 73, 83-85 (2nd Cir. 2004). In making this determination, the Second Circuit properly found that the "special needs doctrine" was applicable to the inspections of the property owned by the Petitioner and her husband.

A. The Second Circuit's Summary Order is not in conflict with any decision of this Court, another Court of Appeals or the New York State Court of Appeals

Petitioner has failed to demonstrate that the Second Circuit's Order in the instant matter, or in *Palmieri v. Lynch*, are in conflict with any decision of this Court including *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 87 S.Ct. 1727 (1967). It is telling is that this Court denied certiorari in *Palmieri v. Lynch* at 546 U.S. 937, 126 S.Ct. 424, 163 L.Ed.2d 323 (2005). The Second Circuit's decision and reasoning in *Palmieri* has not been overruled or modified – and the decision is directly applicable to the instant matter.

In *Palmieri*, the Second Circuit cited to *Camara v. Municipal Court of San Francisco, id.*; *Griffin v. Wisconsin*, 483 U.S. 868, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987); *Dow Chemical v. United States*, 476 U.S. 227, 106 S.Ct. 1819, 90 L.Ed.2d 226 (1986); *California v. Ciralo,* 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986), and other decisions of this Court pertaining to warrantless searches under the Fourth Amendment. The Second Circuit found that the "special needs doctrine" should be applied cautiously while being "especially applicable" in cases involving environmental inspections "given its utility in providing a framework to balance important non-arbitrary governmental objectives against de minimis intrusions in

situations in which there is some degree of an expectation of privacy." *Palmieri* at 80.

B. The inspections of petitioner's property were in accordance with the "special needs doctrine" concerning Fourth Amendment searches

The analysis of the "special needs doctrine" set forth in *Palmieri* was appropriately applied in the Second Circuit's decision herein. (*See* Pet. App. at p. 5a; *Palmieri* at 83.) Petitioner has not distinguished the *Palmieri* holding from the facts and applicable law herein.

Instead, Petitioner has misstated certain facts as part of her argument that the Second Circuit's Order is in conflict with *Camara,* other decisions of this Court, and other Courts of Appeals decisions.

Despite claims in the Petition, there is no evidence that Jay Fain searched the curtilage of Petitioner's property, i.e., "the area immediately surrounding a private house"; *Dow* at 235. Petitioner has referred to hearsay from minutes of the Planning Board but not cited proof in proper form including sworn deposition testimony. The Planning Board minutes referenced by Petitioner actually demonstrate that Fain's inspections were "minimally invasive" and were conducted of wetlands and abutting areas, but not of plaintiff's home. The descriptions in the minutes are of outdoor areas that are not curtilage. (*See* Pet. App. at p. 24-26.)

The inspections were conducted only after neighbors' complaints and petitioner's repeated failures to abide by remedies she had agreed to. The circumstances of the inspections demonstrate that: a) petitioner had "significantly diminished expectations of privacy," b) the inspections were minimally invasive, and c) the Town of Lewisboro had a "serious interest" in protecting natural resources by enforcing wetlands laws. (*See* Pet. App. at 5a; *Palmieri* at 83, 86.)

As set forth in the Magistrate's Report and Recommendations, Mr. Fain initially inspected the Petitioner's property in response to numerous complaints by neighbors that Petitioner's husband was operating a landscape business from their home and performing work in violation of the Town's wetlands laws. (*See* Pet. App. at 18a-19a.) After receiving the complaints, on September 19, 2002 Jay Fain observed Petitioner's husband constructing a stone wall on a wetlands area without a wetlands permit. (The Petitioner's property borders a State-designated wetland.) After Mr. Fain spoke with Petitioner's husband, a stop-work-order was issued as was a summons and notice of wetlands violation. There is no evidence the inspection was anything but "minimally invasive" and it did not pertain to Petitioner's house or curtilage. (*See* Pet. App. at 18a.)

Petitioner and her husband were then advised by letter that they were entitled to representation by counsel at a hearing. At the hearing on November 26, 2002 Petitioner and her husband admitted to – and

apologized for – working in a regulated area without a permit. The Planning Board then withdrew the stop-work-order and adopted a resolution that directed that petitioner and her husband submit and implement a restoration plan and pay a civil penalty of $1,500. (*See* Pet. App. at 18a.) Petitioner did not appeal this Planning Board resolution.

When a plan was not submitted and the penalty not paid, on May 13, 2004 Mr. Fain conducted a routine inspection and observed that additional excavation was being performed without a permit. He then issued a "notice of wetland activity violation." On June 10, 2003 petitioner's husband appeared at a Planning Board hearing and admitted to not complying with the resolution. Another resolution was passed by the Planning Board and Mr. Fain issued a Wetlands Permit. (*See* Pet. App. at 19a.)

On May 13, 2004 Mr. Fain conducted a follow-up inspection and observed that Petitioner had still not implemented the restoration plan. Although Mr. Fain issued another stop-work-order, Petitioner and her husband continued to undertake work. As a result, on June 17, 2004 another notice of wetlands violation was issued.

In response to a neighbor's complaint, further inspections were conducted and stop-work-orders were posted by Mr. Fain on July 15, July 20 and July 23, 2004. On July 27, 2004 Petitioner was granted an adjournment of the Planning Board hearing concerning the alleged violations. When petitioner failed to

appear on the adjourned date of September 28, 2004, the Planning Board again adjourned the hearing. On October 12, 2004 Petitioner and her husband finally appeared – and admitted to violations of the wetlands laws and failure to conform with the Planning Board resolutions. The Planning Board then issued four separate fines. (*See* Pet. App. at 19a.)

Petitioner filed an appeal of these fines with the New York State Supreme Court via an Article 78 petition. The Article 78 petition was dismissed after petitioner failed to appear although directed by the court. (*See* Pet. App. at 19a.) Petitioner did not pursue an appeal of any other Planning Board resolutions.

In April 2005 another summons and notice of wetlands violation was issued to the petitioner and her husband, this time because of sewage discharge into a protected area. The violation was withdrawn after petitioner's septic system was repaired.[3] (*See* Pet. App. at 19a.)

The reasons for the initial and subsequent inspections, and the manner in which the inspections were conducted, were fully in compliance with the "special needs doctrine" pertaining to Fourth

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[3] The excerpt from the minutes of April 26, 2005 pertains to the discharge of sewage into protected areas. (*See* Pet. App. at p. 25.) By this time, Mr. Fain had inspected petitioner's property a number of times because of Petitioner's repeated failure to abide by agreed-upon remedies and because of complaints.

Amendment searches. The inspections were of wetlands areas, not curtilage, and were "minimally invasive."

Petitioner makes misstatements of both law and fact in the discussion concerning installation of a fence on her property and its effect on the Second Circuit's reliance on *Palmieri*. Petitioner incorrectly states that the state court issued a "ruling that Ms. Gennimi was fined $25,000 for installing a fence surrounding her property. The sole reason for installing such fence was to keep Mr. Fain and other town officials from searching her property." (Pet. App. at p. 35-36; citation, p. 35.) In fact, the state court did not make any rulings concerning the fence or any other issue but merely stayed the causes of action. (Pet. App. at p. 44a-46a.)

In addition, there is no evidence that Petitioner had the fence built to prevent officials from searching her property (a factor in *Palmieri* at 81, and in the Magistrate's findings herein; *see* Pet. App. at 36a-37a). Petitioner's sworn deposition testimony about the fence included the following:

> Q. Where was the fence being installed on your property?
>
> A. In my backyard along my wall, stone wall, existing stone wall.
>
> Q. And how far is that stone wall from the back of your house?

A. I don't know what the feet is, to be honest with you. Maybe over 75 feet.

Q. What's on the other side?

A. A lot of trees and a lot of – a lot of trees and bushes and very – just a lot of woods.

Q. Had you applied for a permit before you put up the fence?

A. No, I did not apply for a permit for the fence.

Deposition of Wendy Gennimi, p. 52, lines 10-25. Petitioner's testimony clearly demonstrates that she had a fence built in her back yard, hardly a fence intended to keep out officials from conducting "de minimis intrusions." *Palmieri* at 80-81.

There is also no evidence that Petitioner placed "no trespassing" signs on her property, despite the claims in the Statement. (Pet. App. at p. 4.)

Petitioner's statements about *Sokolov v. Village of Freeport*, 52 N.Y.2d 341, 438 N.Y.S.2d 257 (N.Y. Ct. of Appeals 1981) are also misplaced. (Pet. App. at p. 35-36.) In *Sokolov*, the New York State Court of Appeals held that a municipality could not require the owners of rental property to submit to health inspections before the property was rented. Since that decision was issued in 1981, this Court and Courts of Appeals have not found that the *Sokolov* holding prevents the type of inspections present herein. In fact, the *Palmieri* decision cited *Sokolov*. *Palmieri* at 79.

C. Jay Fain was a consultant who was properly authorized to investigate allegations of violations of the Town's wetlands laws

Petitioner argues that because the Fain respondents were not residents of the Town of Lewisboro and were not Town employees, somehow the "de minimis" inspections were violations of her Fourth Amendment rights. As the Magistrate found in his Report, "None of the case law cited by plaintiffs prohibits the Town from contracting with a private corporation to perform administrative or consultative services." (*See* Pet. App. at 39a.)

The cases cited by Petitioner regarding this issue are not applicable to Fain's activities in carrying out his duties as the Town's wetlands inspector. The holding in *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022 (1971) concerned a warrant issued by the state's chief prosecutor, who later was a prosecutor at the defendant's criminal trial for murder. This Court found that the search warrant was not valid because it was not issued by a "neutral and detached magistrate." *Coolidge* at 449. In the instant matter, Jay Fain did not issue warrants or initiate prosecution of wetlands charges but instead investigated complaints and inspected properties whose owners had applied for wetlands permits.

The *Suss v. ASPCA*, 823 F.Supp. 181 (S.D.N.Y. 1993) holding is also inapplicable because it concerned whether officers of the American Society for

the Prevention of Cruelty to Animals (ASPCA) could use forced entry without a search warrant and without notifying the building owner, to rescue a cat. Herein, there is no evidence that Mr. Fain used forced entry to enter the Petitioner's property or entered the property without her knowledge (or that of her husband). (*See* Pet. App. at 39a.)

Petitioner's allegation that Fain was hired in violation of New York State Town Law § 23 and Public Officers Law § 3 is also misplaced as those statutes pertain only to elected and other "officers" of a town but not to private consultants. (*See* Pet. App. at 51a-52a.) To the extent that this issue may be relevant, as a private consultant, Fain was excluded from the reach of Petitioner's 42 U.S.C. § 1983 claims. *American Manufacturers Mutual Insurance Co. v. Sullivan, et al.*, 526 U.S. 40, 49-50, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999); *Shelley v. Kraemer*, 334 U.S. 1, 13, 68 S.Ct. 836, 92 L.Ed. 1161 (1948).

CONCLUSION

The Second Circuit's Summary Order that affirmed the District Court's granting of summary judgment, was well reasoned and based on the applicable statutes, existing precedent and the facts. The Summary Order adopted, in large part, the Report and Recommendations of the Magistrate Judge, who thoroughly reviewed the claims of the Petitioner and other plaintiffs. Petitioner has not established any

compelling reasons for this Court to grant the Petition. Therefore, the Petition should be denied.

Respectfully submitted,

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